APPENDIX

INTERSTATE COMMERCE ACT

Section 1 (1)(a) (49 U. S. C., Section 1 (1)(a)):

(1) That the provisions of this part shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment.

Section 1 (3)(a) (49 U. S. C., Section 1 (3)(a)):

(3) (a) The term "common carrier" as used in this part shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this part it shall be held to mean "common carrier." The term "railroad" as used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of ship-

ment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term "person" as used in this part includes an individual, firm, copartnership, corporation, company, association, or joint-stock association; and includes a trustee, receiver, assignee, or personal representative thereof.

Section 6 (1) (49 U. S. C., Section 6 (1)):

(1) That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares,

and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part.

Section 6 (2) (49 U. S. C., Section 6 (2)):

(2) Any common carrier subject to the provisions of this part receiving freight in the United States to be carried through a foreign country to any place in the United States shall also in like manner print and keep open to public inspection, at every depot or office where such freight is received for shipment, schedules showing the through rates established and charged by such common carrier to all points in the United States beyond the foreign country to which it accepts freight for shipment; and any freight shipped from the United States through a foreign country into the United States the through rate on which shall not have been made public, as required by this part, shall, before it is admitted into the United States from said foreign country, be subject to customs duties as if said freight were of foreign production.

Section 6(3) (49 U. S. C., Section 6(3)):

(3) No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commis-

sion and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: Provided, That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions; Provided further, That the Commission is hereby authorized to make suitable rules and regulations for the simplification of schedules of rates, fares, charges, and classifications and to permit in such rules and regulations the filing of an amendment of or change in any rate, fare, charge, or classification without filing complete schedules covering rates, fares, charges or classifications not changed if, in its judgment, not inconsistent with the public interest.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 437

BOSTON AND PROVIDENCE RAILROAD CORPORATION STOCKHOLDERS, APPELLANTS

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, the United States of America and the Interstate Commerce Commission, appellees, move that the judgment of the District Court be affirmed.

STATEMENT

This is a direct appeal from a final judgment, entered on March 31, 1955, by a three-judge Dis-

trict Court convened pursuant to 28 U.S.C. 2284 and 2325, unanimously dismissing a complaint seeking to set aside an order of the Interstate Commerce Commission.

The contested order, which was entered by the Commission on July 13, 1954, dismissed a complaint filed with the Commission by four stockholders of the Boston & Providence Railroad Corporation ("B & P") against the New York, New Haven and Hartford Railroad Company ("New Haven"). The complaint requested the Commission to determine and prescribe fair divisions of joint rates under § 15(6) of the Interstate Commerce Act (49 U.S.C. 15(6)) for the transportation of through traffic over the lines of the two rail carriers. The Commission dismissed the complaint upon motion of the defendant, New Haven, for the reason that no joint rates within the meaning of § 15(6) existed between the two carriers (Jurisdictional Statement, Appendix, p. 1a).

The District Court, in dismissing appellants' complaint, sustained the Commission's order on three independent grounds: (1) that appellants have no standing to bring the action; (2) that the bankruptcy court supervising the reorganization of the New Haven has exclusive jurisdiction to determine the amounts, if any, due to B & P; and (3) that the Commission was correct in its construction of § 15(6) (Jurisdictional Statement, Appendix, pp. 2a-12a).

The pertinent facts may be summarized as follows:

B & P is a non-operating railroad. It has no operating organization, no rolling stock, and no facilities for repair and maintenance. In 1888, B & P leased its properties, consisting largely of trackage, to the Old Colony Railroad Company ("Old Colony") for a term of 99 years. Five years later, in 1893, Old Colony leased all its properties, including its leasehold interests in B & P, to the New Haven for 99 years. Since then, the B & P properties have been continuously operated by the New Haven or its trustee.

In 1935, the New Haven filed a petition for reorganization under § 77 of the Bankruptcy Act in the United States District Court for the District of Connecticut. As part of the reorganization, the New Haven trustees rejected the Old Colony lease. Shortly thereafter the court entered an order directing the New Haven trustees to continue operation of Old Colony pursuant to § 77 (c)(6) of the Bankruptcy Act.

In 1938, B & P filed a similar petition for reorganization in the United States District Court for the District of Massachusetts.

The Connecticut court, finding it necessary to make some allocation of earnings and expenses among the component parts of the New Haven system, referred to the Commission, pursuant to § 77(c)(10) of the Bankruptcy Act, a so-called

segregation formula proposed by the New Haven trustees. The Commission reported to the court that the trustees' formula "is as fair and equitable as the circumstances will permit." *New York, N.H. & H. R. Co. Reorganization,* 224 I.C.C. 723 (1938). The segregation formula was confirmed by order of the Connecticut court, and no appeal was taken from that order. The court's authority to ascertain the amounts, if any, due B & P under the formula was upheld in *Palmer* v. *Warren,* 108 F. 2d 164, affirmed, 310 U.S. 132 (1939).

In 1947, the Connecticut court entered a final decree in the New Haven reorganization proceedings, in which it expressly reserved jurisdiction to consider and act on all questions respecting intercompany claims arising out of the operation of B & P properties by the New Haven. B & P appealed from this decree, but it was affirmed by the Court of Appeals for the Second Circuit. *In re New York, N.H. & H. R. Co.,* 169 F. 2d 337, certiorari denied, 335 U.S. 867 (1948).

The reorganization of B & P is still pending. On January 5, 1954, the Commission approved a plan providing for a sale of B & P to the New Haven. 290 I.C.C. 363; 290 I.C.C. 404. The plan, however, has not yet been judicially confirmed.

Appellants instituted the present proceedings before the Commission on March 17, 1954.

ARGUMENT

The District Court correctly held (1) that appellant shareholders lack standing to bring this

action and (2) that the bankruptcy court supervising New Haven's reorganization has exclusive jurisdiction to determine the amounts, if any, to which B & P is entitled. Each of these holdings is sufficient to require affirmance of the judgment below without reaching the District Court's third alternative ground of decision, its construction of § 15(6).[1] We submit, therefore, that this motion to affirm should be granted.

1. Appellants lack standing to maintain this suit. They allege in their complaint that they are a group of B & P stockholders who together hold 1,200 of the 33,291 outstanding shares of the corporation's capital stock. We contend, however, that they have not shown such injury as would entitle them to challenge the Commission's order.

The mere fact that appellants have a personal economic interest in the amount of returns they receive on their stock does not confer the right upon them to maintain this action. They do not obtain standing to sue simply from the fact that they are B & P stockholders. In *Pittsburgh & W. Va. Ry.* v. *United States,* 281 U.S. 479, 487, this Court denied the standing of a minority stockholder in a railroad corporation to challenge a Commission order which allegedly threatened the financial stability of the corporation. The Court said that "[t]he injury feared is the indirect harm which may result to every stockholder from harm

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[1] As we indicate below (pp. 11-12), the Commission is of the view that the District Court correctly construed § 15(6).

to the corporation. Such stockholder's interest is insufficient to give the Pittsburgh a standing independently to institute suit to annul this order." 281 U.S. at 487-488. See also *Schenley Distillers Corp.* v. *United States,* 326 U.S. 432, 435. This "accepted doctrine" was reaffirmed in *American Power & Light Co.* v. *Securities & Exchange Commission,* 325 U.S. 385, 388, 389, but was found inapplicable there to a suit by "a stockholder having a substantial financial or economic interest distinct from that of the corporation which is directly and adversely affected by an order of the Commission, irrespective of any effect the order may have on the corporation * * *." In the instant case, as in the *Pittsburgh & West Virginia* case, appellants' interest is solely derivative, is identical with that of the corporation, and is shared in common with all other B & P stockholders.

In an effort to avoid the effect of the rule enunciated in the *Pittsburgh & West Virginia* case, appellants stress that they were the moving party in the administrative proceeding and that the Commission at no time challenged their standing in that proceeding. But this argument assumes that administrative criteria of standing are identical with judicial criteria of standing. The mere fact that a party is permitted to seek relief before an administrative agency does not *ipso facto* entitle it to judicial review of the agency's denial of relief. See *Pittsburgh & West Virginia Ry. Co.* v. *United States, supra,* at 486.[2] To obtain such review,

[2] For other cases in which parties to an administrative proceeding have been denied standing to obtain review, see

injury to a distinct legal interest of the plaintiff is essential, regardless of whether it was a prerequisite to obtaining agency action. One principal difference, of course, is that the constitutional "case or controversy" requirement is not applicable to administrative proceedings. Cf. *Doremus* v. *Board of Education*, 342 U.S. 429. In any event, appellants, having selected this route and having traveled it on their own without the support of the corporation or the trustee,[3] are themselves responsible for any hardship imposed on them by the denial of judicial review. Despite the fact that there could be no question as to the standing of the trustee to institute the proceedings in the Commission and then obtain review of the Commission's order, appellants have failed to show that they could not adequately protect their rights by seeking a court order compelling the trustee to join in their effort before the Commission.

Nor is appellants' position improved by treating the action as a stockholders' derivative suit. There is no allegation in the complaint that they have been authorized by the court having supervision of the pending reorganization proceeding, or by the B & P trustee, to institute this suit. There

Boston Tow Boat Co. v. *United States*, 321 U.S. 632; *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113; *Moffat Tunnel League* v. *United States*, 289 U.S. 113; *Sprunt & Son* v. *United States*, 281 U.S. 249.

[3] On June 27, 1955, approximately three months after the District Court entered its final judgment of March 31, 1955, dismissing the complaint, the trustee for B & P submitted to the court a petition for intervention, which was denied on July 12, 1955.

is also no allegation that they sought and were refused such permission. Appellants sue to establish a right allegedly belonging to the corporation. Their complaint, however, fails to satisfy the requirements of a derivative action. See Rule 23 (b), F.R. Civ. P.[4] As the District Court pointed out, these requirements are not waived by the statutes governing this suit, 28 U.S.C. 1336 and 2321.

2. The District Court correctly held that it lacked the power to grant the relief sought.

Since 1938 the authority of the Connecticut court to allocate earnings and expenses among the component parts of the New Haven system under the so-called segregation formula has been repeatedly acknowledged by the Commission (224 I.C.C. 723; 275 I.C.C. 617) and upheld by the Court of Appeals for the Second Circuit (108 F. 2d 164; 169 F. 2d 337) and this Court (310 U.S. 132). Under these circumstances, the present action appears to be but a thinly-veiled collateral attack upon the segregation formula and an attempt to circumvent the jurisdiction of the Connecticut court. If the appellants should prevail in this action, the New

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[4] ". . . The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort." If the corporation is in bankruptcy or receivership, recourse must be had to the trustee or receiver in lieu of the usual management. See, *e.g.*, *Wachsman* v. *Tobacco Products Corp.*, 129 F. 2d 815 (C.A. 3); *Lucking* v. *Delano*, 129 F. 2d 283 (C.A. 6).

Haven would be required to account to B & P in a manner other than that prescribed by the elaborate plan so carefully and tediously worked out over the years by the Commission, the parties, and the Connecticut court. The effect would be to render that plan largely nugatory.

Assuming, but without conceding, that B & P might in some circumstances have a just claim against New Haven under § 15(6), the Commission nevertheless properly denied a division here. Pending determination of B & P's claim against New Haven in the bankruptcy proceedings, any effort by the Commission to fix a division between B & P and New Haven in the kind of independent proceeding appellants have attempted would at best duplicate and at worst revise the inter-company allocation which the bankruptcy court must make. Similarly, until the bankruptcy claim is determined, it cannot be known whether the segregation formula in its actual application to B & P will in fact be confiscatory, as appellants contend. And if it is confiscatory, relief can be accorded in the bankruptcy proceeding; for, as the Second Circuit has held, B & P "is free to oppose the application by the District Court of that formula to the liquidation of its account" with New Haven. *Palmer* v. *Warren,* 108 F. 2d 164, 169 (C.A. 2) (on rehearing), affirmed, 310 U.S. 132.

Viewed in this light, the issue is essentially one of priority between two possible forums. The bankruptcy court having first lawfully taken jurisdiction, its jurisdiction cannot be defeated at this late date. As Judge Learned Hand noted in a com-

panion case (*Palmer* v. *Palmer,* 104 F. 2d 161, 165, certiorari denied, 308 U.S. 590), claims under § 15(6) could have been presented to the Commission at the time the Commission was asked to recommend a formula. Neither Old Colony nor B & P took such action, however, and they should be barred from doing so now, at least until the bankruptcy proceeding has run its normal course.[5]

Moreover, the weight to be given to the segregation formula in B & P's reorganization was one of the principal issues before the Commission in its recent consideration and approval of the latest plan for the debtor's reorganization. See 290 I.C.C. 363, 379-392; 290 I.C.C. 404-412. The Commission held (p. 412) that although the segregation formula was one of the factors upon which it had fixed the debtor's valuation for reorganization purposes, the formula could not serve as the "sole indication." See also 290 I.C.C. at 391. The Commission also specifically rejected the contention of B & P stockholders that the formula was not ap-

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[5] The alleged conflict between *Palmer* v. *Palmer* and the instant case is illusory. See Jurisdictional Statement, p. 30. In its context the quoted excerpt from Judge Hand's opinion most certainly does not authorize an independent proceeding under § 15(6) pending the bankruptcy court's determination under the segregation formula. At most the statement means only that such a proceeding *could* have been brought *prior* to adoption of the formula. In the same paragraph Judge Hand stated that "we need not decide whether the Commission was bound by § 15(6) * * * because if the Commission had jurisdiction, the Old Colony was bound to submit its evidence to it, and *at that time* [*i.e.*, prior to adoption of the formula] to secure from it a proper recognition of its privileges under § 15(6)." 104 F. 2d at 165 (emphasis added).

plicable to B & P after its lease had been rejected by the New Haven, and that the Commission therefore had the "duty to establish divisions under the Interstate Commerce Act" (p. 410; see also p. 413). The debtor's plan is now before the Massachusetts District Court for confirmation, and appellants can urge before that court the very contentions which they seek to litigate in the instant proceeding.

3. The District Court also held that B & P was, in any event, not entitled to a division under § 15 (6). This section, the court concluded, applies only to independent carriers actually engaged in the transportation of passengers and property. B & P, on the other hand, is concededly neither independent nor itself engaged in transportation. The District Court's construction of § 15(6) is supported by the Commission's consistent view that it has no statutory authority to prescribe divisions of rates between carriers unless there are joint rates between such carriers (see *Wood* v. *New York Central R. Co.*, 286 I.C.C. 373[6]) and that of Judge Hand in related litigation (*Palmer* v. *Palmer*, 104 F. 2d 161, 165, certiorari denied, 308 U.S. 590).

The Commission submits that this construction of the Act is correct. However, since the first two grounds relied upon by the District Court are fully

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[6] *Accord: Canton Railroad Company* v. *Ann Arbor Railroad Company*, 163 I.C.C. 263, 265-7; *New York Dock Railway* v. *B. & O. Railroad Co.*, 73 I.C.C. 656, 662-3; *Morgantown & Kingwood Division*, 49 I.C.C. 540, 547.

dispositive of the case, it is unnecessary to reach the issue on this appeal. Wholly apart from this issue, a summary affirmance is warranted.

CONCLUSION

The judgment of the District Court is correct and should, without further briefs or argument, be affirmed.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1955

No. 437

BOSTON AND PROVIDENCE RAILROAD CORPORATION STOCKHOLDERS, *Appellants*,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES, *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM

Appellants submit this brief under Rule 16 in opposition to the two motions of appellees to affirm the judgment and orders of the lower court. The New Haven Company, as the true adversary party and the only railroad appellee, filed one such motion. A second motion to affirm on some of the questions was filed on behalf of the United States and Interstate Commerce Commission. Both motions were filed under Rule 16—"on the ground that it is manifest

that the questions on which the decision of the cause depends are so unsubstantial as not to need any further argument."

ERRORS OF FACT IN APPELLEES' MOTIONS

The Government summary of facts (Motion, pp. 3-4) begins by stating that "B&P is a non-operating railroad." Appellants call the attention of the Court particularly to the fact that full public transportation service is provided on the Boston & Providence Railroad "for the account of" the Boston & Providence Corporation, which owns and bears the burden of the Boston & Providence railroad system franchises.[1]

It is true that the Boston & Providence Corporation does not own the title to any rolling stock now in use, but its railroad system is crowded with rolling stock, particularly inbound freight cars, for which the Corporation bears the full rental cost.

Contrary to the Government statement that the Corporation "has . . . no facilities for repair and maintenance", the Commission valuation records credit the Corporation with ownership of shops at Readville worth several million dollars, on which the maintenance of the New Haven equipment pool depends.

It is both misleading and mistaken for the Government to state that, "In 1888, B&P leased its properties *consisting largely of trackage* to the Old Colony Railroad Company for a term of 99 years." Actually the Boston & Providence Corporation leased a complete going-concern railroad system consisting, not of trackage,[2] but of its own railroads

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[1] The word "system" is generally used herein as a convenient but inexact term to designate an assembly of railroads or corporations having some common bond.

[2] "Trackage" is a term used in the railroad industry to denote a right to operate trains over another corporation's railroad on a contractual basis but without the right to possession.

held in fee, with complete freight and passenger terminals, rolling stock, tools and facilities for maintenance and repair, and with a complete operating organization.

The Government motion misleads in that it omits any reference to the rejection of the Boston & Providence lease by the Old Colony trustees at the order of the Connecticut court. The sequence of events was that the Connecticut court ordered the rejection of the Boston & Providence lease in July, 1938 which action then precipitated the Boston & Providence bankruptcy proceeding in August in Boston. (Jurisdiction Statement, pp. 16-17.)[3]

Nor can it be correctly stated as a fact (cf. Government motion, p. 4) that the Court of Appeals or this Court upheld the authority of the Connecticut court "to ascertain the amounts, if any, due the Boston & Providence Corporation *under the formula.*"

Appellants also take exception to the following statement in the New Haven Company's motion (p. 4) that,

> Since 1893, the Boston & Providence's main line of railroad has constituted part of the main line of New Haven's system between Boston and New York.

It would be correct to state that since 1893 the main line of the Boston & Providence Railroad has constituted part of the Shore Line Route from Boston to New York, bearing in mind that, from 1936 to July, 1938, the line was operated for the financial account of the Old Colony Railroad Company as lessee, and that since July, 1938, it has been operated for the separate financial account of the independent Boston & Providence Railroad Corporation rather than for the account of the New Haven Company.

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[3] The segregation formula had been considered by the Commission in April, while the Boston & Providence Corporation was still a lessor to Old Colony.

ARGUMENT

POINT I. IN REPLY TO THE ARGUMENT THAT THE APPELLANTS LACK STANDING

The appellants were pursuing their admitted statutory right when they filed their complaint and began this proceeding (which is now in its appellate stage) to invoke the protection of the Interstate Commerce Act. *United States* v. *New York Central R. Co.*, 272 U.S. 457; *Interstate Commerce Commission* v. *Baird*, 194 U.S. 25; *Backus-Brooks* v. *Northern Pacific R. Co.*, 21 F. 2d 4, certiorari denied, 275 U.S. 562. The particular protection invoked was provided by Congress in the clauses of the Act regulating railroad company revenues, including divisions from through traffic, and granting broad rights of complaint.

The appellees, however, contend that the appellants lack standing in court to obtain review of the Commission's order, on the ground that their claim is derivative within the doctrine of *Pittsburgh & West Virginia R. Co.* v. *United States*, 281 U.S. 479.

The *Pittsburgh & West Virginia* decision, however, even assuming its applicability, did not establish a mechanical rule depriving stockholders of the right to obtain review of administrative orders solely because the formal impact of the order technically falls on their corporation. This has been made clear by the more recent opinion of this Court in *American Power & Light Co.* v. *Securities & Exchange Commission*, 325 U.S. 385. In that case an order of the S.E.C. ran against American Power & Light's subsidiary, the Florida Power & Light Company, and required a change in the latter's accounting which would diminish its earned surplus. The order had an impact on American Power & Light solely because of its stock interest in the Florida company. Nonetheless this Court held that American had an independent standing to obtain review, even though the Florida company itself had also taken an appeal, because while it was true that the order affected American only through its

stock interest in Florida, the legal and economic interest of American in receiving dividends from the earned surplus of the Florida company was *distinct* from the Florida company's interest in preserving its earned surplus and paying dividends therefrom. The Court stated that the protection of American's distinct interest should not be left to the discretion of the Florida company's management who might withdraw the Florida company's appeal.

In order to grant the stockholder standing, this Court did not require a conflict of interest between the stockholder and the corporation, but merely a difference.

The distinct economic and legal interest of the stockholders, and the importance of not leaving it to their corporation management to determine whether their rights should be vindicated, are far clearer in the present case than in the *American Power & Light* case. Nobody has ever doubted that the Boston & Providence Corporation is solvent in the bankruptcy sense. It is in reorganization only because the denial of fair divisions has effectively deprived it of income. The effect of the present proceeding would be to establish its right to income which would then establish its solvency in the equity sense and enable the stockholders to resume the control of the corporation. The stockholders' interest in vindicating their primary proprietary right as owners to control their corporation is far more clearly distinct from the interest of their corporation in the conduct of its business than American Power & Light's interest in receiving dividends was distinct from the interest of its Florida company in paying them.

Moreover, by denying divisions, and thus preventing the restoration of the solvency of the Boston & Providence Corporation, the Commission's order subjects its stockholders to the real possibility of a compulsory relinquishment of their interest in the Corporation and its assets by forced sale to the New Haven Company under the so-called plan of reorganization. The interest of the stockholders in re-

taining their interests in their Corporation is of course wholly distinct from any interest of the Corporation itself.

Not only are the interests of the stockholders more clearly distinct from the interest of their Corporation than was the case in the *American Power & Light* case, but the reasons for not forcing them to rely for vindication of their interests on the decisions and acts of the Corporation are far more compelling. In the *American Power & Light* case the subsidiary Florida company was under the direct and total control of American as the stockholder. In fact it too had sought judicial review of the administrative order. But the Boston & Providence Corporation is wholly inactive. For 17 years its directors have been holdovers or replacements by the inactive board. It is true that the Trustee sought intervention in this proceeding before the three-judge court. But his attempted intervention was delayed, and when it came it was half-hearted and reluctant. He has not even sought to review the denial of his petition to intervene.[4] Thus, whereas American Power & Light was faced only with a possibility that an appeal taken by a wholly-owned subsidiary might be withdrawn (yet that was deemed to justify its independent appeal as stockholder) the Boston & Providence stockholders are confronted with a *certainty* that if this appeal cannot be maintained there will be no review whatever of the administrative tribunal's order which so directly and adversely affects them.[5]

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[4] Appellants believe that the Trustee moved to intervene by the absolute right which the special intervention provision in the Urgent Deficiencies Act granted him "at any time." (Third paragraph of 28 U.S.C. § 2323. See *Brotherhood of Railroad Trainmen* v. *Baltimore & Ohio R. Co.*, 331 U. S. 519, 526-30. See the intervention of the National Industrial Traffic League before the Supreme Court in *Eastern Central Motor Carriers Association* v. *United States*, 321 U.S. 194, selected by Mr. Willey as a model Supreme Court intervention form in 1 West's Federal Forms, sec. 399.)

This issue is raised by Question 9 in the Jurisdictional Statement, pages 9-10, 38-41.

[5] It might conceivably be argued that it was necessary for appellants to have petitioned their reorganization court in Boston to

Moreover, the *Pittsburgh & West Virginia* decision did not hold, as asserted by the New Haven Company (Motion, p. 11) that "the fact that anyone may file a complaint with the Commission does not give that person standing to institute suit in a District Court." It holds instead that, "The mere fact that appellant was permitted to intervene before the Commission does not entitle it to institute an independent suit to set aside the Commission's order in the absence of resulting or actual threatened legal injury to it." 281 U.S. 479, 486.

The cases cited in the Government motion (pages 6-7, note 2) in support of the New Haven Company's view are all cases involving mere intervenors in the administrative proceedings. None is concerned with the right of a moving party having, as here, a direct and paramount interest in the relief requested. The contention that such a moving party does not have a right to obtain review of the order directed against him is clearly contrary to the principle recognized by this Court that,

> A party litigant should always have the right to follow his case to final judgment.
>
> *I.C.C.* v. *Oregon-Washington R. & N. Co.*, 288 U.S. 14, 26.

A denial of appellants' standing to bring this action would have the remarkable effect of holding that in the proceeding before the Commission the defendant but not the complainant was entitled to review of the Commission's

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require the trustee to prosecute the action for judicial review or else replace him with a trustee who would. But that would be wholly inconsistent with the *American Power & Light* decision, since American could far more readily and simply have required the Florida company's directors to act in accordance with American's interests or have them replaced with directors who would. As this Court clearly recognized, what is involved in this type of situation is a vindication of a distinct primary interest of the stockholders. Hence the formal requirements for a derivative action under Civil Rule 23 (b) are wholly inapplicable.

order. Such a holding would violate the provision of Section 10 of the Administrative Procedure Act, Title 5 U.S.C. § 1009, that "every agency action made reviewable by statute (such as the Urgent Deficiencies Act here) shall be subject to judicial review."

It would also violate the provision in Section 10 of the Administrative Procedure Act granting the right of review to persons "adversely affected or aggrieved" by agency action.[6] The appellants were certainly both adversely affected and aggrieved by the order of the Commission, even if,—as was not the case—they had suffered no "legal wrong" in being denied the relief sought in their complaint. *American President Line, Ltd.* v. *Federal Maritime Board*, 112 F. Supp. 346.

In sum, to deny standing to appellants in the circumstances would deny their rights as moving parties to pursue their cause to final judgment; would disregard their right to oppose an order having a direct, distinct, and adverse effect upon their interest; would disregard their rights under the Administrative Procedure Act; and would deny them the opportunity to protect their own interests because of a fiction that the substantive rights at issue belong to a corporation or trustee which has for all practical purposes given them up. Such a denial would find no support in any precedent cited by the court below or by any appellee.

There of course can be no question as to the standing of appellants to raise in this Court the propriety of the action of the court below in taxing extraordinary costs against them. Both because of the clear impropriety of this action

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[6] Section 10(a) provides as follows:

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, *or adversely affected or aggrieved by such action* within the meaning of any relevant statute, shall be entitled to judicial review thereof. 5 U.S.C. § 1009. Emphasis added.

under the circumstances of this case and because we do not wish to obscure the basic substantive issues on this appeal we shall rest, as to this Question, on the treatment in the Jurisdictional Statement, pages 41-43.

POINT II. IN REPLY TO THE CONTENTIONS THAT THE COMMISSION AND THE COURT BELOW LACK JURISDICTION

For the second ground of its motion the government argues *seriatim:*

1. That the segregation formula has been adopted by the Connecticut Court as the basis for the settlement of the accounts between the Boston & Providence and the New Haven and that the present action constitutes a collateral attempt to substitute a different method of accounting and is, therefore, improper.

2. That since the Boston & Providence is still free to contest the use of the adopted segregation formula in the settlement of the accounts in the Connecticut Court, the present proceeding is improper as duplicatory.

3. That since the contentions under §15 (6) of the Interstate Commerce Act could have been presented to the Commission prior to the "adoption" of the segregation formula, there is an estoppel against the assertion of such contentions now.

4. That since the weight accorded to the segregation formula was one of the issues before the Commission in its consideration of the reorganization plan for the Boston & Providence, the claims sought to be vindicated can and should be asserted before the Massachusetts Court.

The mutually contradictory character of these contentions of the Government Motion is so apparent as hardly to need statement. On the one hand the alleged "adoption" of the segregation formula establishes it the "law of the case" but on the other hand its use in the settlement of its

accounts can be attacked as improper and confiscatory. On the one hand the Boston & Providence is estopped to assert its claims to an allocation of earnings under the standards of the Interstate Commerce Act, but on the other hand it is free to assert those claims. On the one hand the Connecticut Court has exclusive jurisdiction of the issues as to the proper basis for determining the division of revenue, but on the other hand such issues may be presented to the Massachusetts Court.

Fortunately, it is unnecessary to engage in the lengthy and tedious analysis that would be required to expose the many fallacies which pervade each of the heads of this multiple Janus. All of them stem from a single neck and are vulnerable to a simple and single surgical cut; all of them rest on the premise that the segregation formula has been adopted as the basis for the settlement of the accounts between the New Haven Company and the Boston & Providence Corporation, whereas the simple fact is that it never has been so adopted.

As was pointed out in the Jurisdictional Statement (pp. 16-17) the segregation formula was prepared for the mortgage trustee for Bondholders of the New Haven Company and so far as the Boston & Providence Corporation is concerned was submitted to support the petition that the Boston & Providence lease should be disaffirmed.[7] On the referral of the formula by the Connecticut Court to the Interstate Commerce Commission for its "recommendations" the Commission held only that as a mathematical computation of intra-system charges the formula was as fair as "the circumstances" then prevailing would permit. That was all that the Commission ever held. The Commission not only did not adopt the formula for the governance of the accounts between the New Haven and the Boston &

[7] Where the Government derived its notion of an "elaborate plan so carefully and so tediously worked out over the years by the Commission, the parties, and the Connecticut Court" (Motion, p. 9) is nowhere stated. It is certainly not derived from the record.

Providence, but on the contrary in recognition of the formula's obvious limitations, the Commission specifically stated that it did *not* approve its use for any substantive purpose. Nor did the Connecticut Court do anything more at the time than grant the trustee's recommendation that the lease be disaffirmed.

The subsequent history of the proceedings also not only fails to support the Government's assertion, but affirmatively rebuts it. The only other order in any other way relating to the use of the formula as between the Boston & Providence and the New Haven was Order No. 301 entered by the Connecticut Court, which purported to settle the accounts between the two companies for the period from June, 1936 through 1937. That order, however, was reversed by the Court of Appeals for the Second Circuit in *Palmer* v. *Warren*, 108 F. 2d 164 on the basis of its holding, which, indeed, is specifically recognized by the Government (Motion, p. 9), that the Boston & Providence interests had never been properly heard on the issue and that the application of the formula to the Boston & Providence operating account was an open question.

Finally, however the ambiguous reasoning or statements of the Interstate Commerce Commission in its various opinions in the Boston & Providence reorganization proceedings may be construed, it is clear from its repeated, explicit statements that it has never passed, indeed has sedulously refused to pass, upon the merits of the segregation formula either in its application to the respective claims of the Companies or as a basis for determining the earnings or right to earnings of the Boston & Providence Corporation.[8]

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[8] It is true that the Commission sometimes spoke about the formula as having been "adopted" in its original opinion which, as we have seen, expressly disavowed adoption. 224 I.C.C. 723. Even when using such loose language, however, the Commission has always divested it of any legal significance by emphasizing that it disclaimed and always had disclaimed any intent to give the formula any binding effect. E.g., 290 I.C.C. 404, 412.

Since all the jurisdictional contentions of the Government rest on its assumptions that the segregation formula has been adopted for the governance of the accounts, the fact that the formula has *never* been so adopted is in itself sufficient to dispose of its contentions.[9] The government, indeed, now scrupulously avoids the contention that the jurisdiction of the Connecticut court over the operating accruals under paragraph (c)(6) of section 77 or the jurisdiction of the Massachusetts court over the Boston & Providence reorganization proceedings would *per se* deprive the Commission of its jurisdiction under section 15(6) of the Interstate Commerce Act. This is undoubtedly attributable to its recognition that such a contention clearly would raise substantial issues for the reasons set forth in appellants' Jurisdictional Statement (pp. 26-30).

Indeed, the government's own interpretation of Judge Hand's opinion in *Palmer* v. *Palmer*, 104 F. 2d, at p. 165, supports the view that an independent proceeding under section 15(6) lies—at least so long as no binding formula for the determination of the accounts has been adopted by the bankruptcy court (Government motion, p. 10, note 5).

Even in the absence of that opinion, it would appear to be clear that the jurisdiction of the Connecticut court over the accounts does not automatically oust the jurisdiction of the Commission to determine the fair allocation of revenues from joint traffic under the Interstate Commerce Act any more than it ousts the Internal Revenue Service and the Tax Court of their powers and responsibilities with respect to the resolution of tax questions, the answers to which also may play a significant role in the final settle-

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[9] Even if the segregation formula had been adopted by the Commission for the purpose alleged by the government it would be subject to challenge and revision. As this Court said in *Baltimore & Ohio R. Co.* v. *United States*, 298 U.S. 349, at p. 364, "Congress is without power conclusively to bind the carriers . . . Congress has no power to make final determinations of just compensation or to prescribe what constitutes due process of law for its ascertainment".

ment of accounts to be submitted to and passed on by the New Haven's bankruptcy court.

It is a well-settled rule that the division of rates, like the fixing of rates, is a *legislative* and not a judicial function. As this Court said in *Terminal R.R. Association* v. *United States*, 266 U.S. 17, at page 30—

> The making of rates is a legislative and not a judicial function. . . . The division of joint rates is also legislative in character. The Interstate Commerce Commission is authorized to establish through routes and joint rates and to prescribe conditions upon which such routes shall be operated and to fix divisions of such rates among carriers. . . . It is well settled as a general rule that the question of the reasonableness of rates or of divisions of joint rates will not be considered by the courts before application has been made to the Commission.

So far as the Massachusetts court is concerned the answer is equally clear. Its function in evaluating the fairness of a plan of reorganization before it is primarily to predict what the future earnings of the debtor would be—*absent the reorganization.* See *Consolidated Rock Products Co.* v. *Du Bois*, 312 U.S. 510; *Ecker* v. *Western Pacific R. Co.*, 318 U.S. 448; *Institutional Investors* v. *Chicago, M. St. P. & P. R. Co.*, 318 U.S. 523. This in the present case would involve a prediction of the joint revenues and a prediction of what the Commission would hold to be a proper division of such joint revenues under section 15(6) of the Interstate Commerce Act. There is nothing in the Bankruptcy Act which could possibly justify the court in itself fixing the divisions so as to oust the Commission of its jurisdiction under section 15(6) any more than it could determine a debtor's income by itself fixing the rates to be charged to shippers and passengers so as to oust the Commission of its jurisdiction under the companion section of the Interstate Commerce Act. The fact that appellants can and will argue that the Massachusetts court may not

appropriately proceed to consider the plan prior to a determination of the revenues of the debtor under the standards of the Interstate Commerce Act for the purpose of determining its solvency, as well as the fairness of the plan, is, of course, wholly irrelevant to the Commission's jurisdiction to make that determination except insofar as it underscores the importance of the exercise of such jurisdiction.[10]

In sum, no formula in any way binding on the Boston & Providence Corporation has ever been adopted for the determination of the proper division of revenues from joint traffic of the Boston & Providence lines and the connecting true New Haven lines. The responsibilities of the Connecticut and Massachusetts courts, respectively, to rule on the accounts under paragraph (c)(6) of section 77 and to determine the solvency of the Boston & Providence Corporation and pass upon the proposed plan of reorganization, not only do not oust the Commission of its jurisdiction to divide the joint revenues in accordance with the standards of the Interstate Commerce Act, but appear to require action by the Commission thereunder as a prerequisite for the intelligent and informed fulfillment of those judicial responsibilities.

POINT III. IN REPLY TO THE ARGUMENT THAT THE BOSTON & PROVIDENCE CORPORATION IS NOT A CARRIER BY RAILROAD AND HAS NO RATES TO DIVIDE

The New Haven Company contends (Motion, p. 10) that the appeal should be summarily dismissed on the ground that the Boston & Providence Corporation is not a carrier by railroad engaged in transportation and that there are

[10] The recognition by the Massachusetts court of the importance of the present proceeding in aiding that court in carrying out its judicial responsibilities wth respect to the so-called debtor is indicated by its action in instructing the trustee in bankruptcy to intervene in the court below and in postponing further proceedings on the plan until the completion of the present proceeding.

no joint rates to divide between the Corporation and the New Haven Company.[11]

While it is true that from 1888 until July 19, 1938, the Boston & Providence Corporation was a lessor rather than a carrier, its lessor status terminated with the termination of its lease to Old Colony. As a matter of law the carrier status thereupon reverted to the Boston & Providence Corporation.

As lessor the Corporation had been as inactive as a mortgagee. But when its lease was rejected, its legal status became very different. When the New Haven or Old Colony Company defaulted on a mortgage, the mortgagee (such as Bankers Trust Company) remained a mere mortgagee under section 77, without even the right to foreclose. But when the executory lease was rejected it *terminated*, and with it terminated the lessor's status as lessor; it then resumed its original status which it had formerly enjoyed before it ever executed the lease—the status of a carrier financially engaged in the public transportation service over its railroad lines.

After its lease had terminated (just when its entire debt was maturing) the Boston & Providence Corporation was received for reorganization under section 77 in Boston. In order to be so received it had to qualify as a matter of law as a railroad corporation according to the strict definition of paragraph (m) of section 77—

> (m) The term "railroad corporation" as used in this . . . section means any common carrier by railroad engaged in the transportation of persons or property in interstate commerce. 11 U.S.C. § 205 (m).

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[11] The Commission agrees with that position, but the Solicitor General and Assistant Attorney General Barnes, as counsel for the United States do not adopt it, so the joint Government motion mentions it without advancing it as a ground for summary dismissal. (Motion, page 5, note 1, and pages 11-12.)

Having accepted the Corporation as a carrier by railroad for purposes of its ministrations under Section 77 of the Bankruptcy Act the Commission ought to accept it likewise for purposes of the Interstate Commerce Act.

The fact is that the Interstate Commerce Act divides all railroad companies into the two categories of *carriers* and *lessors*.

> (8) . . . the term "carrier" means a common carrier subject to this part, . . .;[12]
>
> . . . the term "lessor" means a person owning a railroad, a water line, or a pipe line *leased to* and operated by a common carrier subject to this part . . . (Emphasis added.)
>
> Section 20, 49 U.S.C. § 20. See paragraphs (1), (5), (7).

The Boston & Providence Corporation has been a carrier with respect to the movement of all traffic on its railroad system since the lease terminated. The Corporation has maintained the franchises. Its lines and trackage are crowded with traffic. The Corporation is the party charged by law with the full cost of providing the entire transportation service, including the rolling stock. The function of the New Haven Company is to provide the services of a general operating agent, and to operate an equipment pool. In such a situation the principal, not the agent, is the carrier within the contemplation of the Interstate Commerce Act. *Powell* v. *United States*, 300 U.S. 276, 285.

The classification of "non-operating railroad" or, rather, "non-operating carrier" has no support in the Interstate Commerce Act, or in court decisions. The New Haven Company, however, cites it in support of the ground for

[12] The Commission subclassified *carriers* into Class I line-haul carriers (with gross revenues exceeding $1,000,000 annually), Class II and Class III line-haul carriers (with smaller revenues), and switching or terminal companies. See I.C.C. Steam Railway Annual Report Form A, instructions inside front cover.

summary dismissal now under consideration. It finds such a classification in one decision of the Commission itself, *Wood* v. *New York Central R. Co.*, 286 I.C.C. 373, wherein the Commission devised such a classification to justify its denial of divisions to the Peoria & Eastern Railway Company as against New York Central. But neither the *Wood* decision nor earlier decisions in the Commission on which it was said to rest, are applicable to the present case.

In the present case the New Haven Company is the operating agent for the Boston & Providence Corporation, by virtue of paragraph 5 of Order 217 in the New Haven Company's reorganization proceeding, dated July 17, 1938, (R. folio 117), which stated that the operation of Boston & Providence properties "shall be conducted by the New Haven Trustees in behalf and for the account of the Old Colony estate but without expense to the New Haven estate." The order was modified on September 11, 1947, at the time of the New Haven Company's emergence from reorganization, but that company continued on in the agency. The risk of loss and burden of the franchises are on the Boston & Providence Corporation, and its operating agent is an altogether separate company, having no financial commitment under the agency to support the operation and only a very limited minority investment in its shares.

The relationship of the Peoria & Eastern and the New York Central, which was the subject of the *Wood* case, was vitally different. To begin with, the Peoria Company is a *subsidiary* of the New York Central Railroad Company. Its directors and officers, except for one man, are directors or officers of the New York Central Company or of companies in the New York Central System. The relationship, which rests on an 1890 agreement, is unclear. As the Commission itself stated in its opinion, "the precise status of the parties in realtion to each other, that is, whether by the contract the Big Four was established as the Peoria & Eastern's agent or as bona fide lessor [i.e., lessee], was

not determined." 286 I.C.C. 373, 378. The original agreement set forth that it would "be beneficial to the business and traffic of said railways [the contracting parties] that the same be put under one management." (Page 2 of the Peoria Agreement, quoted *ibid.*) The Court of Appeals had found that, "In short, the Peoria was to become part of a single railway system, operated as a constituent unit after the conventional pattern in such cases." *Ewen* v. *Peoria & Eastern R. Co.*, 78 F. Supp. 312, 316. By that agreement Big Four (which is a large lessor and subsidiary in the N.Y.C. System) and its successors were bound to pay certain rentals, interest, and taxes plus all operating expenses for the Peoria company and the recovery of such advances was limited by the terms of the agreement, as follows:

> Fifth.—The Cleveland Company [the Big Four] shall and will look only to such future net earnings of said lines of railroad operated by it under these presents ... for the reimbursement to it of any sums it may advance in compliance with its aforesaid covenants and agreements. (Page 7 of the Peoria Agreement, Appendix A to petition for certiorari, No. 467, Supreme Court of the United States, October Term, 1940.)

Big Four and its successor, New York Central, acquired no general claim against the Peoria company for any advances. Either they recouped their losses out of the Peoria's earnings before the end of the agreement or they had no recovery.

Given the differences between the relationship of the Peoria Company with the New York Central, and the relationship of the Boston & Providence Corporation with the New Haven Company, the *Wood* case affords little guidance. As a *subsidiary* company in the New York Central Corporate System, Peoria could have been dealt with under the language of *Pittsburgh & West Virginia Ry. Co.* v. *Pittsburgh & Lake Erie R.R. Co.*, "In our judg-

ment, for the purpose of fixing divisions the separate corporate organizations of these commonly controlled and operated carriers should be disregarded and they should be treated as one system." 61 I.C.C. 272, 284.

Even more simply, the treatment of the Peoria company could be justified on the ground that it is a *lessor*, although with a lease having unconventional terms. (New York Central reports Peoria as both a subsidiary and lessor in its annual reports to the I.C.C.)

If the *Wood* case, however, is to be taken as holding that a railroad company which has its railroad system operated by an agent for its account is a "non-operating carrier" without right to divisions under the Act established principles of agency law, it would seem clearly in conflict with past decisions dealing with railroad operations carried on by an agent. *Powell* v. *United States, supra; New York, S. & W. R. Co. Reorganization*, 261 I.C.C. 101, 271 I.C.C. 339, 349, 275 I.C.C. 10, 24; *Terminal Allowances at Minnesota Transfer*, 268 I.C.C. 5, 9-10.

Insofar as the Wood decision holds that the Peoria company is a non-operating carrier because its lines are operated by a management shared in common with a controlling parent company, it is not only irrelevant but in conflict with the Commission's own views in *Central R. Co. of Pennsylvania Lease*, 261 I.C.C. 755, 775; and *New Jersey & New York R. Co. (Peter Duryee, trustee)* v. *Erie R. Co.*, 292 I.C.C. 479. See also *Backus-Brooks* v. *Northern Pacific R. Co.*, 21 F. 2d 4, certiorari denied 275 U.S. 562.

In the *Central Railroad Company of Pennsylvania* case, the Commission approved transfer for carrier status from the parent Jersey Central Company to the Pennsylvania Company, and held that the Pennsylvania company was entitled to divisions against Jersey Central, which the Commission approved. The Pennsylvania company's entire capitalization was limited to 500 shares of stock, all held by Jersey Central (except qualifying shares), and it

had no separate operating management. The separation was established by a lease for 15 years, solely to segregate Jersey Central's mileage in Pennsylvania (from Easton to Wilkes-Barre and Scranton) in order to insulate it from taxation under the New Jersey Railroad Tax Law of 1941. The Commission approved the arrangement over the opposition of the State of New Jersey.

In the *New Jersey & New York* case, the company was left behind as an orphan under section 77 when the parent Erie company emerged from reorganization. The Ohio reorganization court appropriately transferred the matter to New Jersey. Although 84% owned by Erie, and showing its operating management (except for the trustee) as furnished entirely by the Erie (see The Pocket List of Railroad Officials) and drawing all its equipment from the Erie pool (see Jurisdictional Statement, pp. 32-33), the Commission recognized it as a carrier and therefore increased its divisions from through traffic with the Erie Railroad Company.

Reference may also be made to the New York Connecting Rail Road Company, which is accorded carrier status and receives divisions although it owns only 9 miles of road, with 12 more miles of trackage, is managed entirely by the New Haven Company, draws on the New Haven equipment pool for all locomotives and cars required, and is entirely owned by the New Haven and Pennsylvania Railroad companies. It was set up as a carrier to replace operation by the New Haven, in connection with mortgage bond financing, which ran to $3,000,000 per mile. Its divisions kept its bonds at top investment grade throughout the reorganization.[13]

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[13] The I.C.C. Blue Book for 1952 (published in 1955) classifies it as a Class I line-haul carrier in the New England region, separate from the New Haven System. *Statistics of Railways in the United States* (1952), I.C.C., pages 126, 311, 329, 557, and 563, line 201. Compare the erroneous listing of Boston & Providence on line 203, as a subsidiary of and lessor to the New Haven Company. This error possibly influenced the position of counsel.

In view of the foregoing standard treatment, the Wood decision must fall back for support, if it be supportable, on the proposition that Peoria was not a carrier solely because it was not a party to joint rates filed with the Commission. This indeed seems to be the actual *rationale* of the Commission's position before the court below.

As for there being no joint rates to divide between the Boston & Providence Corporation and the New Haven Company, appellants deny it. There is constant public transportation of persons and goods in through movements over the connecting lines of the two railroad systems. The service is performed for revenues calculated according to tariffs filed or concurred in by the New Haven Company acting in several capacities, that is to say, as principal with respect to transportation service on its own lines, as agent for the New York Connecting, Grafton & Upton, Moshassuck Valley, Narragansett Pier, and Union Freight railroad companies by explicit statement in the tariffs which Mr. H. D. Hartmann, the New Haven freight traffic manager, issues for all those companies, and as agent for the Boston & Providence Corporation, by virtue of Order 217, of which all the world has notice, including, not least, the Commission. (See the cover of New Haven Freight Tariff 1-A, I.C.C. No. F 4340.) Such filing is part of the New Haven's assigned duties as general operating agent for the Boston & Providence Corporation.

If the tariffs thus filed are perhaps irregular as to their precise technical formalities, in not listing the Boston & Providence Corporation explicitly along with the other principals, such a defect is a ministerial error by which the New Haven Company should not be allowed to manipulate a profit for itself, or to alter the course of basic legal relationships.[14] The Commission, of course, has

[14] Possibly a clause might be added to the New Haven tariffs, such as "for its own account and for the account of the Boston & Providence Railroad Corporation on the latter's lines."

had notice of the financial responsibility for transportation service on the Boston & Providence lines since 1938. It would be a curious result if the Commission could now deny the substantive relief asked by appellants because it has tolerated a possible irregularity in the formalities of the tariffs and concurrences which has accepted all along to govern the public transportation service over the Boston & Providence lines.[15]

But even if no joint rates existed at the time appellants filed their complaint with the Commission, it could have established such rates and divided them as requested by the appellants in their prayer for relief. Such relief, contrary to the New Haven Company's statement (Motion, page 7, footnote 10), was approved by this Court in *United States* v. *Great Northern Ry. Co.*, 343 U.S. 562. There would be no valid reason for denying the same relief here.

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[15] Compare the Commission's treatment of the Wisconsin Central Railway Company. The reorganization of that company presented a close parallel to the present case. The Soo Line receivers terminated their company's lease of the Wisconsin Central System (which extends the Soo from the Twin Cities and Twin Ports down to Chicago). A new arrangement was worked out, according to the I.C.C. 1952 Blue Book (p. 576), by the receivers of the two companies, with court approval, whereby the Soo Line continued to operate the Wisconsin Central lines, but as agent for the Wisconsin Central Company, which went into receivership on December 3, 1932, the date of the agreement.

Soo Line continued to file the tariffs entirely in its own name, just like New Haven, but Wisconsin Central was established as the party entitled to the full benefit of the rate divisions east of the Twin Cities and Twin Ports. The 1952 Blue Book listed *Wisconsin Central* as a *Class I line-haul carrier*, a separate carrier in the "Canadian Pacific System." Pages 127, 428, 430, 434, 448, 576.

(The I.C.C. 1938 Blue Book still listed Wisconsin Central as a lessor, but the 1952 Blue Book (published in 1955) has corrected the error.)

POINT IV. AS TO THE NEW HAVEN COMPANY'S ARGUMENT THAT APPELLANTS' REMEDY IS BY MANDAMUS

The New Haven Company (Motion, pp. 10-11) asserts that appellants have no standing to bring this action but should have proceeded by mandamus in the courts for the District of Columbia.

The United States and Interstate Commerce Commission urged that position as a main ground for dismissal in the court below, but they do not adopt that position now.

Since this Court's decision in *Rochester Telephone Co.* v. *United States,* 307 U.S. 125, mandamus, in appellant's view, would not be an appropriate remedy for them. As set forth above, the order of the Commission affected their interest directly, and even the New Haven Company in the footnote on page 11 of its motion concedes that a negative order having a direct effect on a party is reviewable under the Urgent Deficiencies Act on the basis of the *Rochester Telephone* decision.

CONCLUSION

For the reasons set forth in this brief, appellants respectfully submit that the motions of the appellees have not demonstrated, under Rule 16, "that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need any further argument."

Respectfully submitted,

ARMISTEAD B. ROOD

JOSEPH B. HYMAN

Counsel for Appellants

CASSIUS M. CLAY

SIDNEY H. WILLNER
Of Counsel

December 9, 1955

No. 437.

DEC 16 1955

HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

BOSTON AND PROVIDENCE RAILROAD CORPORATION STOCKHOLDERS,

Appellants,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, INTERSTATE COMMERCE COMMISSION and THE UNITED STATES,

Appellees.

MOTION OF BOSTON AND PROVIDENCE RAILROAD CORPORATION STOCKHOLDERS COMMITTEE FOR LEAVE TO INTERVENE OR, IN THE ALTERNATIVE, TO FILE BRIEF *AMICUS CURIAE.*

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Counsel for Boston and Providence Railroad Corporation Stockholders Committee,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 437.

BOSTON AND PROVIDENCE RAILROAD CORPORATION STOCKHOLDERS,

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v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, INTERSTATE COMMERCE COMMISSION and THE UNITED STATES,

Appellees.

MOTION OF BOSTON AND PROVIDENCE RAILROAD CORPORATION STOCKHOLDERS COMMITTEE FOR LEAVE TO INTERVENE OR, IN THE ALTERNATIVE, TO FILE BRIEF *AMICUS CURIAE.*

Samuel M. Freeman and William P. Sheffield, as the Boston and Providence Railroad Corporation Stockholders Committee (herein called the Committee), hereby respectfully move for leave to intervene in this cause. In the alternative, the Committee prays leave to file a brief *amicus curiae*. Appellants' counsel, the General Counsel of the Interstate Commerce Commission and the Solicitor General have consented to the filing of a brief *amicus curiae*. Such consent has not been received from counsel for The New York, New Haven and Hartford Railroad Company (herein called New Haven).

The Committee's interest arises from the fact that it holds written authorizations to represent the registered holders of more than 17,000 shares of the capital stock of Boston and Providence Railroad Corporation (herein called B&P). The shares represented either by the Committee or by appellants together amount to a majority of the 36,688 shares outstanding.* If the shares owned by or believed to be optioned to New Haven are excluded, the shares outstanding in the hands of the public are 22,185, of which the shares represented either by the Committee or appellants amount to over 83%.

The Committee has an absolute right to "intervene at any time" in this cause (28 U. S. C. §2323; *cf. Brotherhood of Railroad Trainmen* v. *Baltimore & Ohio R. Co.*, 331 U. S. 519, 526-530). As to the right of the Committee to intervene at the present stage of the proceeding see *Eastern-Central Motor Carriers Association* v. *United States*, 321 U. S. 194, where the National Industrial Traffic League was permitted to intervene in this Court (see 1 West's Federal Forms, §399).

The Committee did not seek to intervene in the court below, expecting the reorganization trustee to do so. When for reasons best known to himself, the trustee failed to do so, the Committee joined appellants in asking the B&P reorganization court to instruct him to do so. The Massachusetts court issued the instruction but the Virginia court refused leave to the trustee to intervene. The trustee has refused to appeal from that refusal. Under these circumstances it is all the more important that the actual majority owners of the property speak to this Court through representatives of their own choosing.

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* Of the 40,000 authorized shares of B&P stock, 40 are held in the treasury and 3,272 are held in the sinking fund for B&P debentures.

The Committee is of the opinion that the questions presented by the present appeal are substantial and vitally affect the primary interests of the B&P stockholders. The Committee believes that the decision of the appeal on the merits will be of the utmost importance to the B&P stockholders. The Committee has for many years opposed the efforts of New Haven to acquire the B&P assets on the basis of assumptions as to their earning potentialities which have not been properly investigated or determined. The Committee is confident that a determination of the appeal after full consideration on the merits will have the effect of permitting the B&P stockholders to establish the solvency of their corporation and thus their right to retain their interests and resume control over its affairs.

WHEREFORE the Committee prays leave to intervene in support of appellants' position and, if the Court decides to hear argument on the merits, to file a brief and participate in the oral argument. In the alternative, the Committee prays leave to file a brief *amicus curiae*.

Dated at New York, New York, this
15th day of December, 1955.

Respectfully submitted,

RALPH MONTGOMERY ARKUSH,
Counsel for Boston and Providence
Railroad Corporation Stockholders
Committee,
15 Broad Street,
New York 5, New York.

JACOB J. KAPLAN,
NUTTER, MCCLENNEN & FISH,
Of Counsel,
75 Federal Street,
Boston 10, Mass.

Certificate of Service.

I hereby certify that I have this day served the foregoing motion by depositing a copy thereof in a United States mail box, with first class postage prepaid, addressed to each counsel of record at his post office address.

New York, N. Y., December 15, 1955.

RALPH MONTGOMERY ARKUSH.

FILED
DEC 21 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 437

BOSTON AND PROVIDENCE RAILROAD CORPORATION STOCKHOLDERS,

Appellants,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, INTERSTATE COMMERCE COMMISSION and the UNITED STATES OF AMERICA,

Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

OBJECTION TO THE MOTION OF BOSTON AND PROVIDENCE RAILROAD CORPORATION STOCKHOLDERS COMMITTEE FOR LEAVE TO INTERVENE OR, IN THE ALTERNATIVE, TO FILE BRIEF AMICUS CURIAE

WILLIAM T. GRIFFIN,
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New York, New York.

HERBERT BURSTEIN,
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New York, New York.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 437

BOSTON AND PROVIDENCE RAILROAD CORPORATION STOCKHOLDERS,

Appellants,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, INTERSTATE COMMERCE COMMISSION and the UNITED STATES OF AMERICA,

Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

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OBJECTION TO THE MOTION OF BOSTON AND PROVIDENCE RAILROAD CORPORATION STOCKHOLDERS COMMITTEE FOR LEAVE TO INTERVENE OR, IN THE ALTERNATIVE, TO FILE BRIEF AMICUS CURIAE

Appellee, The New York, New Haven & Hartford Railroad Company, pursuant to Rule 42(3) of the Revised Rules of this Court, files the within objection to the motion by the Boston and Providence Railroad Corporation Stockholders Committee, for leave to intervene or, alternatively, to file a brief *amicus curiae*.

Statement

Appellee, The New York, New Haven & Hartford Railroad Company, withheld consent to the filing of a brief *amicus curiae* because it believes that the movant has no *locus standi*. A motion of this kind is not favored [Rule 42(1)] because it adds nothing to the resolution of the issues before this Court.

Appellee further objects to the motion on the ground that it does not set forth "facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the disposition of the case: * * *" [Rule 42(3)].

I

The appeal in this case was taken from certain final orders of a three-judge statutory court, dismissing a complaint in an action instituted by the appellants under the Urgent Deficiencies Act, 28 U. S. C. §§ 1336, 1398 and 2321-2325, inclusive.

The action in the three-judge court, as well as the complaint filed with the Interstate Commerce Commission, asserted harm to the Boston and Providence Railroad Corporation and sought the vindication of a corporate right. (Jurisdictional Statement, pp. 22-23, Appendix, p. 2a).[1]

In *New York Central Securities Corporation* v. *United States, et al.*, 54 F. (2d) 122 (D. C. N. Y., 1931), affirmed 287 U. S. 12, the Court held that a stockholder cannot, in a suit under the Urgent Deficiencies Act, assert harm to the corporation. *Pittsburgh & W. Va. Ry.* v. *United States*, 281 U. S. 479.

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[1] The standing of the Committee cannot be equated with that of a stockholder. The authorizations referred to in the Motion (p. 2) do not create standing. At best, the Committee represents minority stockholders only.

There is no allegation in the complaint of an independent, as distinguished from a derivative, interest, i.e. a claim that any portion of the operating revenues is to be paid directly to the stockholders (Jurisdictional Statement, Appendix, p. 1a, 2a, 9a). Indeed, any such claim should have been asserted in the principal action, and not at this stage of the appeal.

II

Appellee does not seek to foreclose the assertion of legally cognizable rights. It objects only because the movant has no right to intervene or to file a brief *amicus curiae*.

WHEREFORE, appellee prays that the motion be denied in all respects.

Respectfully submitted,

WILLIAM T. GRIFFIN,
233 Broadway,
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HERBERT BURSTEIN,
135 Broadway,
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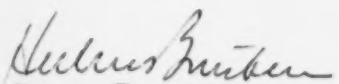

HERBERT BURSTEIN,
of Counsel.

Dated: New York, N. Y.,
December 19, 1955.

Certificate of Service

I hereby certify that I have this day served the foregoing Objection to the Motion by Boston and Providence Railroad Corporation Stockholders Committee by depositing a copy thereof in a United States mail box, with first class postage prepaid, addressed to each counsel of record at his post office address.

New York, New York, December 19th, 1955.

Herbert Burstein

HERBERT BURSTEIN

Office - Supreme Court, U. S.
FILED
JAN 3 1956
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 437.

BOSTON AND PROVIDENCE RAILROAD CORPORATION STOCKHOLDERS,

Appellants,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, INTERSTATE COMMERCE COMMISSION and THE UNITED STATES,

Appellees.

REPLY TO OBJECTION OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY TO THE MOTION OF BOSTON AND PROVIDENCE RAILROAD CORPORATION STOCKHOLDERS COMMITTEE FOR LEAVE TO INTERVENE, ETC.

The objection filed by New Haven to the motion of the Boston and Providence Railroad Corporation Stockholders Committee for leave to intervene, or, in the alternative, to file a brief *amicus curiae,* appears to assert as one ground for objection that the Committee represents only the minority of the stockholders of B&P. While the Committee does not regard that purported ground as germane to the consideration of its motion it believes, now that the issue has been raised, that it may be helpful to the Court to have the factual situation clarified.

As was stated in the motion (note, page 2), although 40,000 B&P shares are authorized, 40 are held in the

treasury and 3,272 are held in the sinking fund to secure the B&P debentures, which have all been acquired by the New Haven Company.[1]

Thus, only 36,688 shares are actually outstanding, *i. e.* held outside B&P, of which 3,397 are now registered as owned in the name of New Haven, leaving 33,291 shares registered as publicly held (See Jurisdictional Statement, page 13).

Of these 33,291, the stockholder list for December 16, 1955 lists 8,106 shares as registered in the name of Central Standard Life Insurance Company of Chicago. Central Standard has been acquiring them during the past eighteen months for a price of $105[2] pursuant to contracts entered into with New Haven Company under which Central Standard gave New Haven an option to buy the shares at Central Standard's cost price, in return for which New Haven agreed to indemnify Central Standard against loss, and to pay Central Standard current income at 5% per annum on the latter's investment, plus a flat fee on each share, and in addition New Haven deposited and pledged a large block of its own senior Harlem River bonds as collateral. New Haven has also entered into similar arrangements for acquisition by other third persons of as many as 3,850 shares at flat prices up to $120 per share under the same type of arrangement for options to New Haven in exchange for indemnification, current income, collateral,

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[1] A reorganization trustee must act in the interests of creditors as well as stockholders. The interests in this case conflict.

[2] Central Standard also presented its sellers with a letter agreeing to pay them later whatever additional price New Haven or Central Standard might pay to other sellers in order to obtain 51% of the B&P shares by July 1956. The program to assemble a majority for the New Haven Company was doubtless motivated by fear that the B&P Corporation would be protected by the Florida East Coast merger decision (*St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.*, 347 U. S. 298, see Jurisdictional Statement, page 28) if it should remain an independent corporation.

and a fee (or commission) running as high as $6.25 per share.

Without now raising the obvious issues with respect to the legality or fiduciary propriety of the above mentioned transactions, the Committee is of the view that none of the above mentioned shares covered by options—estimated at 11,106—should be considered in the class of publicly held shares. Of the remaining 22,185 shares the Committee, as the only committee now licensed by the Interstate Commerce Commission to represent the stockholders, holds written authorizations (under the modern practice in lieu of deposits) to represent more than 17,000. The Committee and the appellants together speak for more than 18,345 shares, which amounts to a majority of the entire 36,688 outstanding shares, 55% of the 33,291 shares registered as publicly held and 83% of the 22,185 shares in reality publicly held.

WHEREFORE, the Committee prays the Court to grant its motion, and to regard the appeal as supported by the holders of an absolute majority of the shares speaking in the only way they can speak, and to proceed to full consideration of the merits.

Dated at New York, N. Y., the 30th day of December, 1955.

Respectfully submitted,

RALPH MONTGOMERY ARKUSH,
Counsel for Boston and Providence Railroad Corporation Stockholders Committee,
15 Broad Street,
New York 5, New York.

JACOB J. KAPLAN,
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Of Counsel,
75 Federal Street,
Boston 10, Massachusetts.

Certificate of Service.

I hereby certify that I have this day served the foregoing reply by depositing a copy thereof in a United States mail box with first class postage prepaid, addressed to each counsel of record at his post office address.

New York, N. Y., December 30, 1955.

RALPH MONTGOMERY ARKUSH.

FILED
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HAROLD B. WILLEY, Clerk

No. 437

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

BOSTON AND PROVIDENCE RAILROAD CORPORATION STOCKHOLDERS, *Appellants*

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY ET AL., *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

MOTION TO CLARIFY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 437

BOSTON AND PROVIDENCE RAILROAD CORPORATION STOCKHOLDERS, *Appellants*

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY ET AL., *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

MOTION TO CLARIFY THE ORDER OF JANUARY 9, 1956

The appellants respectfully move the Court to clarify its Order of January 5, 1956, which reads as follows:

PER CURIAM: The motion of Boston and Providence Railroad Corporation Stockholders for leave to inter-

vene or, in the alternative, to file brief as *amicus curiae* is denied. The motions to affirm are granted and the judgment is affirmed.

The Court has not given any opinion or citation to show the basis of its summary affirmance. Thus it has left unresolved three major questions raised by the Appeal, whose resolution is essential for the unavoidable further proceedings involving the rights of the Boston and Providence Railroad Corporation and its security holders. These questions are as follows:

1. Did the Court mean to bar the present action on the ground that only the Corporation or its trustee in bankruptcy can obtain court review of the adverse ruling which the Interstate Commerce Commission entered against the stockholders under Section 15(6) of the Interstate Commerce Act? *Or* did the Court mean to hold that the Boston & Providence Corporation itself has no right to relief under Section 15(6)?[1]

2. Did the Court mean to hold that because the Boston & Providence System is being operated under a court order entered pursuant to Section 77(c)(6) of the Bankruptcy Act no independent remedy under Section 15(6) of the Interstate Commerce Act is available? *Or* did the Court mean to hold more broadly that because the present operating arrangement was established pursuant to Section 77(c)(6) the Boston & Providence Corporation is not entitled in this or any other proceeding to have its revenues from through transportation service measured according to the standard provided in Section 15(6)?

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[1] Or did the Court merely intend to bar the action because it was not brought as an action in the nature of mandamus in the District of Columbia, as the New Haven urged?

3. Did the Court mean to direct the Boston & Providence Corporation and its stockholders to the New Haven reorganization court and the Boston reorganization court for the assertion of their claims as to the unfairness and inequity of the application of the segregation formula of 1938 to their accounts with the New Haven—as urged by the Solicitor General? *Or* did the Court mean to hold—as urged by the New Haven—that the Boston & Providence Corporation is finally bound by the formula in any division of the revenues and may not challenge it in any proceeding?[2]

The judicial and administrative proceedings for the reorganization of the Boston & Providence Corporation in the Boston court and the operation of its railroad system by the New Haven under the New Haven court have now gone on for 17½ years. The presently inevitable litigation as to the proper construction of this Court's action of January 9 may well serve to protract indefinitely the proceedings which have already been protracted unconscionably. Petitioners submit that in the interest of sound judicial administration it is important that this Court clarify its ruling on the above issues raised by this Appeal so that the federal tribunals and the parties may be able to proceed properly. Such clarification would seem to be particularly appropriate in view of the fact that many of the difficulties in determining the respective rights and claims have been attributable to the divergent interpretations of the intended scope of this Court's statement in *Warren* v. *Palmer*, 310 U.S. 132.

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[2] The Government position follows the ruling of the Court of Appeals for the Second Circuit in *Palmer* v. *Warren*, 108 F. 2d 164. The position of the New Haven follows the conflicting position of the court below in this action.

In that case this Court approved the assumption by the New Haven's reorganization court of jurisdiction over the Boston & Providence operating accounts. In so doing it said (at page 138) that Section 77(c)(6) "modifies *pro tanto* the rule of the Interstate Commerce Act for operation". There has since been continuous disagreement as to whether, by reason of this language, Section 77(c)(6) displaces the provisions of the Interstate Commerce Act not only with respect to operation and abandonment but also with respect to the substantive standards of the Act, such as those establishing the standards to govern the division of revenues from through traffic.

WHEREFORE, petitioners respectfully pray the Court to clarify its affirmance of the judgment below.

Dated at Washington, D. C., this second day of February, A.D. 1956.

Respectfully submitted,

ARMISTEAD B. ROOD

JOSEPH B. HYMAN

Counsel for Appellants

CASSIUS M. CLAY

SIDNEY H. WILLNER

Of Counsel

Office - Supreme Court, U.
FILED
FEB 3 1956
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1955—No. 437

BOSTON AND PROVIDENCE RAILROAD CORPORATION STOCKHOLDERS, *Appellants*

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY ET AL., *Appellees*

PETITION TO RECONSIDER THE ORDER OF JANUARY 9, 1956

The appellants respectfully petition the Court to reconsider its Order of January 9, 1956.

By its Order of January 9 the Court summarily affirmed the judgment of the lower court. That judgment contains holdings on the Administrative Procedure Act, the Interstate Commerce Act, the Urgent Deficiencies Act, the Bankruptcy Act, and the Fifth Amendment to the Constitution which are of great importance and unprecedented. They conflict with holdings in other circuits and with holdings of this Court. Their effect is confiscatory.

Additional grounds for this petition are set forth in the accompanying petition and motion.

Dated at Washington, D. C. this second day of February, A.D. 1956.

Respectfully submitted,

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Kentucky

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Washington 5, D. C.
Of Counsel

ARMISTEAD B. ROOD
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JOSEPH B. HYMAN
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Counsel for Appellants

No. 437

FILED
FEB 3 1956
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preme Court of the United States

OCTOBER TERM, 1955

STON AND PROVIDENCE RAILROAD CORPORATION
STOCKHOLDERS, *Appellants*

v.

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD
COMPANY ET AL., *Appellees*

AL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

ITION FOR RECONSIDERATION OF THE JUDGMENT AS TO COSTS

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Supreme Court of the United States

OCTOBER TERM, 1955

No. 437

BOSTON AND PROVIDENCE RAILROAD CORPORATION STOCKHOLDERS, *Appellants*

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY ET AL., *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

PETITION FOR RECONSIDERATION OF THE JUDGMENT AS TO COSTS

The appellants respectfully petition the Court to reconsider so much of its Order of January 9, 1956, as affirmed the judgment of the court below taxing extraordinary costs against the plaintiffs on the ground that their action to obtain judicial review of the order which the Interstate Commerce Commission entered against them was vexatious and oppressive to the New Haven Railroad Company.

Petitioners believe that this Court, in its summary disposition of the appeal, may have passed over this question, which in the presentation of the appeal was necessarily subordinated to the discussion of the substantive issues. Petitioners find it impossible to conceive that, if the question were considered separately, this Court would have found that the action was not brought in good faith for the purpose of resolving properly litigable issues and that the parties bringing it should be punished by a financial penalty and a judicial reprimand.

This proceeding was begun before the Interstate Commerce Commission to obtain a division of rates under Section 15(6) of the Interstate Commerce Act. Its purpose was to establish the actual solvency of the Boston and Providence Railroad Corporation on the theory that its apparent insolvency was attributable to the fact that it had been unlawfully deprived of a proper division of the revenues collected by the New Haven Company for joint transportation service over the two railroads. The decision to assert this claim in a Section 15(6) proceeding arose in part from the suggestion of Judge Learned Hand in *Palmer* v. *Palmer*, 104 F. 2d 161, at page 165, that this was the only way to obtain a consideration of this claim under the Interstate Commerce Act.

The standing of petitioners, as stockholders of the B&P Corporation, to bring a proceeding under Section 15(6) before the Commission is well settled and has not been challenged. Issue was raised, however, as to their standing to obtain review of the Commission's order denying the relief sought. If this asserted lack of standing was the basis of the Court's affirmance, it is, so far as petitioners know, the first holding that a complainant entitled to institute a proceeding for relief before the Commission has no standing to obtain judicial review of the Commis-

sion's adverse order. For this reason alone petitioners cannot see how the bringing of the review proceeding can possibly be deemed frivolous on this ground. In addition there was a substantial basis for the assertion of standing by virtue of the independent economic interest of the stockholders in establishing the solvency of their Corporation and regaining control over it by terminating its reorganization.[1]

The issue was also raised that the jurisdiction of the federal court at New Haven which had directed the New Haven Company to operate the Boston & Providence System under Section 77(c)(6) of the Bankruptcy Act was exclusive, and had ousted the Commission and the courts from their normal jurisdiction to regulate revenues from through traffic under Section 15(6) of the Interstate Commerce Act and the Urgent Deficiencies Act (28 U.S.C. §§ 1336, 1398, and 2321 to 2325 inclusive). If this was the basis of this Court's affirmance of the judgment below, it is the first time that this aspect of the relationship of these two important statutes has been considered and resolved. Again, petitioners submit that to seek judicial determina-

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[1] The informed Boston reorganization court ordered the B&P trustee to intervene as co-plaintiff, in face of the New Haven's oral and written argument that this action was vexatious and oppressive. The Boston court, on its own initiative, has postponed hearing the reorganization plan for more than a year, solely in deference to the importance of this action to the B&P reorganization.

In addition the B&P Stockholders Committee sought to intervene in this appeal, so that it would be supported by nearly the entire class of B&P stockholders (except for shares controlled by the New Haven).

All this attests the seriousness of this action.

tion of this vital question cannot fairly be deemed "vexatious and oppressive" or be taken to show frivolity and bad faith.

The third major issue was that as a matter of construction of the Interstate Commerce Act the Boston & Providence Corporation is not a carrier entitled to a division of rates under that Act. This was the Commission's sole basis for denying relief. Again, if it was also the basis of this Court's summary affirmance, it should be noted that the question whether the operation of a railroad for the account of its owner under Section 77(c)(6) deprives the owner of carrier status for purposes of regulating its revenues from the public transportation service has never been previously settled. That the issue is, at the least, not frivolous is indicated by the fact that the Solicitor General expressly refrained from making it a ground of his motion to affirm.

While according full recognition to the problems of this Court in allocating its time among the many claims upon it, petitioners have found it difficult to understand the decision to dispose of the foregoing issues, all of which are both novel and important, on a summary basis without full consideration. In any event, and with all respect, they find it incredible that any court should regard their raising of these issues as an indication of bad faith and frivolity requiring them to be stigmatized and penalized.

The action of the court below in this regard can be attributed only to its reliance on unsupported statements by the New Haven that the legal issues before the court had been previously presented and resolved. As petitioners have demonstrated in their Jurisdictional Statement (at pages 34-37) and their Brief in Opposition to the Motions to Affirm (at pages 10-12) there is no basis for those as-

sertions. Indeed, the Commission and the Solicitor General scrupulously refrained from associating themselves with them.[2]

The action of the court below thus constituted a clear abuse of discretion—an abuse which, in the context, has the effect not only of wronging petitioners but of discouraging security holders from acting in good faith for the vindication of their legitimate interests.

WHEREFORE, petitioners respectfully and earnestly pray the Court to reconsider its affirmance of that part of the judgment below which taxes extraordinary costs and upon reconsideration to reverse summarily.

Dated at Washington, D. C. this second day of February, A.D. 1956.

Respectfully submitted,

ARMISTEAD B. ROOD

JOSEPH B. HYMAN

Counsel for Appellants

CASSIUS M. CLAY

SIDNEY H. WILLNER

Of Counsel

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[2] The Government motion appeared to argue that the 1938 segregation formula had been adopted by the New Haven reorganization court, but it recognized that the issues which would be raised by applying the formula to the operating account remained open.